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BRIEF OF SENATORS ROBERT C. BYRD, DANIEL PATRICK MOYNIHAN, AND CARL LEVIN AS *AMICI CURIAE* IN SUPPORT OF APPELLEES

INTEREST OF AMICI[1]

The Constitution vests legislative responsibility in a bicameral Congress subject to a limited check by the President. The Line Item Veto Act of 1996 upsets this careful allocation of authority by granting to the President a unilateral power to amend or repeal legislation. As members of the United States Senate, amici have a strong interest in preservation of the Constitution's "single, finely wrought and exhaustively considered, procedure," *INS v. Chadha*, 462 U.S. 919, 951 (1983), for making laws.

STATEMENT

When Congress presents the President with a bill under Article I, section 7 of the Constitution, the bill can become law in one of three ways: the President can sign it; he can let it become law without his signature; or, if the President vetoes the bill by returning it with his objections, Congress can override the veto by a two-thirds vote in each House. These requirements govern "[a]mendment and repeal of statutes, no less than enactment" of them. *INS v. Chadha*, 462 U.S. at 954.

The Act gives the President item veto authority only over bills he has "signed into law." 2 U.S.C. § 691(a); *see also id.* § 691e(1) (appropriations "signed into law"); *id.* § 691f(c) (tax bills "signed into law"). He cannot strike items in bills that become law without his signature or as a result of veto overrides.

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[1] Statement pursuant to Rule 37.6: No part of this brief was authored by counsel for any party to this appeal. The only monetary payment for preparation or submission of this brief will be by the Offices of Senators Byrd, Moynihan and Levin for its printing.

If the President signs a bill within the ten days (Sundays excepted) provided by the Constitution, the Act extends his domain over it for five more days (Sundays also excepted). 2 U.S.C. § 691(a). Within that extended time he may cancel "whole" amounts of two broad spending categories ("discretionary budget authority" and "new direct spending") and any "limited tax benefit." *Id.*

"Budget authority" is "authority provided by Federal law to incur financial obligations." *Id.* § 622(2)(A). "Discretionary" authority may be found in "any general or special appropriation Act, or any Act making supplemental, deficiency, or continuing appropriations." *Id.* § 691e(1). The President may item veto the "entire dollar amount of budget authority . . . specified in an appropriation law" or "required to be allocated by a specific proviso in an appropriation law for which a specific dollar figure was not included." *Id.* § 691e(7)(A)(i).

The President is not limited to the text of appropriations laws. To give him "increased discretion," H.R. Conf. Rep. No. 104-491 ("Conf. Rep.") at 32 (1996), he may cancel amounts "represented separately in any table, chart, or explanatory text included in the statement of managers or the governing committee report accompanying such law." 2 U.S.C. § 691e(7)(A)(ii). He may also "look through," Conf. Rep. at 33, an appropriation act to an authorization act that provides for the availability of funds, and cancel the amount stated there. 2 U.S.C. § 691e(7)(A)(iii).

"Direct spending" is "(A) budget authority provided by law (other than an appropriation law); (B) entitlement authority; and (C) the food stamp program." *Id.* § 691e(5). In addition to canceling payments to individuals and private entities, the President may void payments to state and local governments. Conf. Rep. at 36-37.

"New" direct spending means a "provision of law that is estimated to result in an increase in budget authority or outlays" in the current or future years. 2 U.S.C. § 691e(8). There need not be "a net increase" in spending. A new direct spending measure is subject to cancellation "whether or not it is offset by another provision that reduces direct spending or increases revenues in the same law." Conf. Rep. at 36. The President may base cancellations on the "interactions among provisions in a new law, other provisions in that same new law, and underlying law." *Id.*

A "limited tax benefit" includes any "Federal tax deduction, credit, exclusion, or preference to 100 or fewer beneficiaries" that is "revenue-losing" within five fiscal years. *Id.* §§ 691e(9)(A)(i) and (E). It also includes a provision which "provides temporary or permanent transitional relief for 10 or fewer beneficiaries in any fiscal year from a change" in the federal income tax code. *Id.* § 691e(9)(A)(ii).

The President must determine that cancellations will reduce the federal deficit, not impair essential federal government functions, and not harm the national interest. *Id.* § 691(a). But within these outer limits, the Act provides no standard for choosing among the thousands of items that may be canceled each year.

Spending and tax item vetoes "immediately" and "automatically," Conf. Rep. at 22, "take effect upon receipt" in the House and Senate of a message "notifying" Congress of the cancellation. 2 U.S.C. § 691b(a). A cancellation "is nullified only if a disapproval bill is enacted into law." Conf. Rep. at 22.

The power to "cancel" an appropriation is defined as the power to "rescind" it. 2 U.S.C. § 691e(4)(A). The power to "cancel" direct spending or limited tax benefits is defined as the power "to prevent" them "from having legal force or

effect." *Id.* § 691e(4)(B) and (C). It "renders the provision void, such that the obligation of the United States has no legal force or effect." Conf. Rep. at 22.

For contracts, cancellation "foreclose[s] the ability of the Federal Government to enter into an agreement." For entitlements or food stamps, it negates the government's "legal obligation to pay a benefit" or "eliminat[es] the increase in food stamp obligations that would otherwise occur." *Id.* at 29. For taxes, cancellation empowers the President "to collect the tax that would otherwise not be collected or to deny the credit that would otherwise be provided." *Id.*

The Act contains no severability clause. The Senate bill had been amended on the floor to provide (as part of a judicial review section) "that if any one provision of the Act is found to be unconstitutional, the remainder of the Act will be held harmless." Conf. Rep. 17. But the conferees without explanation deleted the clause. *Id.* at 41.

The Act has been exercised to strike 82 items from the principal spending and tax bills of a full budgetary cycle: three items from the annual reconciliation legislation enacted in 1997, divided into a spending law — the Balanced Budget Act of 1997, Pub. L. No. 105-33 (1 item), and a tax law — the Taxpayer Relief Act of 1997, Pub. L. No. 105-34 (2 items), and 79 items from nine of the thirteen regular annual appropriation laws enacted in 1997 for Fiscal Year 1998.[2]

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[2] *See* Statement of June E. O'Neill, Director, Congressional Budget Office, on *The Line Item Veto Act After One Year: Before the Subcomm. on Legislative and Budget Process of the House Comm. on Rules*, 105th Cong., 2d Sess. (Mar. 11, 1998).

SUMMARY OF ARGUMENT

The Line Item Veto Act grants the President a unilateral power to amend or repeal legislation. From the perspective of either the truncated versions of laws that are left after line item vetoes or the repeal of the provisions that are removed by them, the Act unconstitutionally alters the lawmaking system established by the Framers.

1. The Framers built on the principle, long settled in England, that the Executive should not alter legislation but be limited to approving or disapproving laws. They rejected proposals to grant the President an absolute final power to disapprove bills, and instead provided the Executive with a limited role in the legislative process. The requirement that the House and Senate, elected on different electoral principles, must agree before any new law is made or an existing one is changed or repealed, is an essential feature of the Framers' lawmaking system. The Constitution mandates the concurrence of both Houses to the final contents of spending and tax bills as well as all other legislation.

2. The Line Item Veto Act undermines central values and balances of the Constitution. The accommodation of differences is a vital task in a representative democracy. But the Act empowers the President to strike provisions essential to achieving compromise in the House and Senate and concurrence between them. The Constitution provides ground rules for revisiting compromises. They require that the two Houses agree in order to change the terms of a bargain between them. The Framers understood that the separation of powers in lawmaking would bear upon other balances between the legislative and executive branches. The Act also undermines the public's interest in faithful adherence to the separation of powers.

3. The fundamental question is whether the Act's item veto authority is "essentially legislative in purpose and effect." *INS v. Chadha*, 462 U.S. at 952. The Act places the President procedurally and substantively in the legislative process. His power is uniquely tied to the manner in which he exercises Article I authority. The "nature of the decision" made by the President "further manifests its legislative character." *Id.* at 954. In crafting Article I, the Framers enabled the President to veto entire bills because he disagrees with their policy. The Act unconstitutionally enlarges the President's Article I authority by also empowering him to item veto provisions of bills because he disagrees with Congress about their policy or mode of enactment, or for any other reason. The "legislative character" of the President's item veto power is also "confirmed by the character of the congressional action it supplants." *Id.* at 952. The actions supplanted are legislative measures that have been approved by both Houses and may be amended or repealed only by their bicameral action.

4. In their brief, appellants introduce an argument about the severability of item veto authority for taxes, but they did not present a question about it. There is strong evidence that coverage under the Act of a full spectrum of federal fiscal matters — appropriations, direct spending, and targeted tax benefits — was essential to the legislative bargain that made passage possible. In any event, the Constitution's "single, finely wrought" procedure for making laws, *INS v. Chadha*, 462 U.S. at 951, is indivisible and applies to legislation on all subjects.

ARGUMENT

The lawmaking system established by the Constitution operates on a simple principle. Both the Senate and House have to agree to every legislative measure or it cannot become law. Either House may "propose" amendments to any bill, but each needs to "concur" in the other's amendments before the bill may become law. *See* U.S. Const., Art. I, § 7, cl. 1. The President may "return" a bill to Congress for "reconsideration," *id.* cl. 2, but has no power to alter any bill.

The district court examined the Act from several perspectives and correctly concluded that its constitutionality failed each examination. The Act violates Article I because "laws that resulted after the President's line item veto were different from those consented to by both Houses of Congress." J.S. App. 24a; *see Raines v. Byrd*, 117 S. Ct. 2312, 2325 (1997) (Stevens, J.) (dissenting on standing) ("Act purports to establish a procedure for the creation of laws that are truncated versions of bills that have been passed by the Congress and presented to the President for signature"). The President's unilateral alteration of provisions of duly enacted laws also breaches the requirement, likewise grounded in Article I, that "[o]nce a bill becomes law, it can only be repealed or amended through another, independent legislative enactment." [3]

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[3] J.S. App. 25a. *See* 142 Cong. Rec. S2963 (daily ed. Mar. 27, 1996) (Sen. Levin):

> The problem with the current bill is that it fails the fundamental test of being consistent with the requirements of the Constitution that any repeal or amendment to a law be enacted in the same way that the law itself was enacted. The Constitution establishes the method by which laws are enacted, by which laws are amended, and by which laws are repealed. It is fundamental constitutional law.

From either perspective — that of the truncated versions of laws left after line item vetoes or the repeal of provisions taken out by them — the Act profoundly alters the lawmaking process established by the Constitution. It thus "impermissibly disrupts the balance of powers among the three branches of government." J.S. App. 27a. These conclusions are well-grounded in both the history and underlying principles of the Constitution's bicameralism and presentment requirements.

I. THE FRAMERS' LAWMAKING SYSTEM HAS TWO CENTRAL FEATURES: A LIMITED VETO POWER FOR THE PRESIDENT AND A UNIVERSAL REQUIREMENT OF BICAMERALISM

The Framers were students of history. They built on knowledge that in England "the share of legislation, which the constitution has placed in the crown, consists in the power of *rejecting*, rather than *resolving*." 1 W. Blackstone, *Commentaries on the Laws of England* 154. In that role, "The crown cannot begin of itself any alterations in the present established law; but it may approve or disapprove of the alterations suggested and consented to by the two houses." [4]

[4] *Id.* The early 15th century origin of the requirement that "the king shall have nothing to do save to assent or dissent" to laws is described in F.W. Maitland, *The Constitutional History of England* 189 (1908) (reprinted 1993). After repeatedly protesting unilateral changes by the king of laws requested by it, in 1414 commons prayed and Henry V agreed that there be "no law made and engrossed as statute and law neither by additions or diminutions by no manner of term or terms the which should change the sentence and intent asked." *Id.*; *see also* C.E. Stevens, *Sources of the Constitution of the United States* 94-95 (1894) (U.S. Constitution "perpetuates this usage . . . by limiting the executive to simple veto or approval").

The Framers also remembered abuses of royal prerogatives. In explaining the resolve to separate from England, the Declaration of Independence sets forth the "history of repeated injuries and usurpations, all having in direct object the establishment of an absolute Tyranny over these States." The first grievance listed was that the king "has refused his Assent to Laws, the most wholesome and necessary for the public good."

Against that background, the Constitutional Convention turned early in its proceedings to the task of creating "a single, finely wrought and exhaustively considered, procedure," *INS v. Chadha*, 462 U.S. at 951, for making laws. Beginning with Edmund Randolph's plan for organizing the new government, the Convention considered the two issues that are at the heart of this case: the relationship between Congress and the President in lawmaking — the veto power, and the relationship between the two Houses of Congress in that process — bicameralism.

A. The Veto Power

On May 29, Randolph proposed that "the National Legislature ought to consist of two branches," 1 *The Records of the Federal Convention of 1787* 20 (M. Farrand rev. ed. 1966)("Farrand"), and that "a National Executive be instituted." *Id.* at 21. With respect to lawmaking, he proposed that "the Executive and a convenient number of the National Judiciary, ought to compose a council of revision with authority to examine every act of the National Legislature before it shall operate." Upon its examination of the act, the "dissent" of the Council "shall amount to a rejection" of it. But the Council would not have the last word. Its rejection would not stand if "the Act of the National Legislature be again passed,. . . by [ ] of the members of each branch," the requisite fraction to be supplied. *Id.*

The Convention took up the resolution on June 4. After discussing whether to join Judges with the Executive in a Council of Revision[5] — an idea they ultimately rejected — the Framers focused on the Executive's power to "negative" Acts of Congress.

James Wilson and Alexander Hamilton moved "to give the Executive an absolute negative on the laws." *Id.* at 98. Benjamin Franklin objected. With reference to Pennsylvania, he related:

> The negative of the Governor was constantly made use of to extort money. No good law whatever could be passed without a private bargain with him. An increase of his salary, or some donation, was always made a condition; till at last it became the regular practice, to have orders in his favor on the Treasury, presented along with the bills to be signed, so that he might actually receive the former before he should sign the latter.

Id. at 99. If the Convention accepted the absolute negative proposed by Wilson and Hamilton, Franklin feared that the result would put "the Legislature into a compleat subjection to the will of the Executive."[6]

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[5] *Id.* at 97-98. In considering the Presentment Clause, the Framers made repeated use of the word "revision": *e.g.*, "Council of Revision," or the proposal to present bills to the President "for his revision." 2 Farrand 181. The accepted definition of "revision" at the time of the framing was "review." 2 S. Johnson, *A Dictionary of the English Language* (6th ed. 1785); *see Nixon v. United States*, 506 U.S. 224, 229-30 (1993) (use of Johnson's Dictionary).

[6] *Id.* Colonel Mason seconded Franklin's observations on the "probable abuses of a negative." 1 Farrand 101. Drawing on "experience, the best of all tests," Mason warned in language relevant to the shift of power here:

Roger Sherman concurred, being "agst. enabling any one man to stop the will of the whole." "[W]e ought," he said, "avail ourselves of his wisdom in revising the laws, but not permit him to overrule the decided and cool opinions of the Legislature." *Id.*

The key, Madison suggested, was the "proper proportion" of each branch of the Legislature that "should be required to overrule the objections of the Executive." *Id.* At day's end, the Convention rejected the idea of an absolute veto and voted to enable "*two thirds* of each branch of the Legislature to overrule the revisionary check." *Id.* at 104.

The Convention revisited several times the issue of the Executive's role in lawmaking, but its final product adhered to the basic framework established on June 4. At one point, in August, the Convention increased to 3/4 the vote in each House required to override the President's negative. 2 Farrand 301. But the Convention returned to the lower 2/3 requirement in September. *Id.* at 587. Hugh Williamson, who had moved in August to increase the required override vote, told the Convention that the higher vote "puts too much in the power of the President." *Id.* at 585.

While the basic design ultimately remained intact, the Convention added considerable detail to what became Article I, section 7, clause 2. Regarding the specific steps prescribed in the Presentment Clause, little if anything was left to imagination.

The steps are precise. Every bill must first "have passed the House of Representatives and the Senate." "[B]efore it

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> The Executive may refuse its assent to necessary measures till new appointments shall be referred to him; and having by degrees engrossed all these into his own hands, the American Executive, like the British, will by bribery & influence, save himself the trouble & odium of exerting his negative afterwards.

become a Law," each bill must "be presented to the President." The President's choices are exactly stated: "If he approve he shall sign it, but if not he shall return it." The manner of return is prescribed: the bill is to be accompanied by "his Objections," it is to go "to that House in which it shall have originated," and that House "shall enter the Objections at large on their Journal." [7] Time is counted exactly: the President is to act within ten days (Sundays excepted). A two-thirds vote in each House is required to override a veto; votes on override must be recorded. To avoid ambiguities by which the strictures of the Presentment Clause might be "evaded," 2 Farrand 304-305, the Framers added a second clause to assure that these steps applied to "Every Order, Resolution, or Vote" in which the Senate and House must concur. U.S. Const., Art. I, § 7, cl. 3.

Within the limited legislative role prescribed for him by the Constitution, part of the President's power is that his reasons for proposing or acting on a bill are not circumscribed. At the front end, he may recommend to Congress such measures "as he shall judge necessary and expedient." U.S. Const., Art. II, § 3. At the back end, he may, in Madison's words, return bills in order "to restrain the Legislature from encroaching on the other co-ordinate Departments, or on the rights of the people at large; or from passing laws unwise in their principle, or incorrect in their form." 1 Farrand 139. In short, he may veto a bill simply

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[7] In providing for a permanent record of the President's objections, the Framers understood it might take time to see wisdom in those objections. "[T]he objections of the president," James Wilson observed in lectures on the Constitution, "even when unsuccessful, will not be without their use." If "experience shows the law to be replete with all the inconveniences, which sagacious scrutiny foresaw in its operations, the disease will no sooner appear, than the remedy will be known and applied." 1 *The Works of James Wilson* 406 (Andrews ed. 1896).

because he disagrees with it. But while he possesses this broad power "before" a bill becomes a law, once it is law his duty is to "take Care that [it] be faithfully executed." U.S. Const., Art. II, § 3.

B. Bicameralism

A second feature of the Framers' lawmaking system is the core principle that two Houses of Congress based on "different modes of election, and different principles of action," The Federalist No. 51, p. 350 (J. Cooke ed. 1961) (Madison), must agree before any new law is made or an existing one is amended or repealed.

The Framers reached early consensus that the House should be "elected by the people." But they struggled over two points. One was the representation of large and small states in the Senate. The other was the allocation between the two chambers of legislative authority over the power to spend and tax. In writing a Constitution in which "the legislative department alone has access to the pockets of the people," The Federalist No. 48, p. 334 (Madison), the Framers had to determine how to assign authority within a bicameral Congress over these pivotal matters.

There can be no doubt about the importance to the Framers' design of the powers to spend and tax. Balancing the Executive's hold on "the sword of the community," the Legislature "commands the purse." The Federalist No. 78, pp. 522-23 (Hamilton). To Madison, the power of the purse was "the most compleat and effectual weapon with which any constitution can arm the immediate representatives of the people, for obtaining a redress of every grievance, and for carrying into effect every just and salutary measure." The Federalist No. 58, p. 394. And in a federal nation, "the power of taxation" was "the most important of the authorities

proposed to be conferred upon the Union." The Federalist No. 33, p. 205 (Hamilton).

The committee charged with considering competing plans reported to the Convention on July 5. It recommended that the House be apportioned on the basis of population, a benefit to larger states, and that each state have an equal vote in the Senate, an accommodation to smaller states. On allocating authority between the Houses, it recommended "that all bills for raising or appropriating money . . . shall originate in the 1st branch of the Legislature, and shall not be altered or amended by the 2d branch." 1 Farrand 526. This would have limited the Senate's role to approving or disapproving (but not shaping through amendments) money bills originating in the House.

The Convention accepted the committee recommendation to apportion the House on the basis of population. It also accepted as a central principle of the Constitution the idea of equality of the states in the Senate. But the Framers modified the committee recommendation about the two legislative powers that were absolutely critical to the compromise: the power to spend and the power to tax. These, of course, are the very powers involved in the Line Item Veto Act. Limiting to "Bills for raising Revenue" the exclusive power of the House over origination, the Convention agreed that even as to them "the Senate may propose or concur with Amendments as on other Bills." U.S. Const., Art. I, § 7, cl. 1.

This cemented (save for origination of revenue bills) "the equal authority" of the two Houses in the lawmaking process. The Federalist No. 58, p. 393 (Madison). Not only is the "concurrence of separate and dissimilar bodies required in every public act," The Federalist No. 63, p. 427 (Madison), but each House through the amending process has an equal opportunity to shape every law, subject to the concurrence of the other House.

II. THE ACT UNDERMINES CENTRAL VALUES AND BALANCES OF THE CONSTITUTION

A. Compromise and Accommodation Within the Legislative Branch

The bicameral system crafted by the Framers establishes a measured lawmaking process that requires three separate legislative concurrences before a bill may become a law. The House must agree within itself, and the Senate must do the same. Then the two Houses must agree with each other. Under the Great Compromise, Madison explained, "No law or resolution can now be passed without the concurrence first of a majority of the people, and then of a majority of the states." The Federalist No. 62, p. 417.[8]

But under the Line Item Veto Act, the President may strike provisions instrumental to obtaining majorities in either Chamber. Or he may keep provisions critical to passage in the House, while excising amendments that were equally critical to Senate passage, or vice versa. The final product no longer need be the one that attained "the concurrence" of the people and the States as the Framers had required.

In "produc[ing] laws in violation of the requirement of bicameral passage," J.S. App. 27a, the Act undermines the genius of the Constitution's lawmaking system. Clashes of interest are an inevitable part of representative democracy in a continental nation whose "so many separate descriptions of citizens" embrace, as Madison observed (The Federalist No. 51, pp. 351, 353), a "great variety of interests, parties and

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[8] When the Committee of Detail proposed that each House "have a negative on the other," Madison moved (and the Convention agreed) to strike the phrase as superfluous, "the idea being sufficiently expressed" in the vesting of legislative power in two distinct bodies, the Senate and House. 2 Farrand 197.

sects." The Framers anticipated and respected clashes of interest, while providing for accommodation through "a process of discussion and compromise." J.S. App. 24a.

Applying a new "science of politics," The Federalist No. 9, p. 51 (Hamilton), the Framers not only accepted "human nature," *id.*, No. 51, p. 349 (Madison), but enlisted it to help bring about an enduring republic. There would be conflicts. "Ambition must be made to counteract ambition," Madison wrote. Thus, the Constitution is organized around devices that offset "by opposite and rival interests, the defect of better motives." *Id.* Throughout our history Members have supported measures to achieve progress in other regions "for the common benefit." [9] But the Framers also expected Members would often be "partizans of their respective States." The Federalist No. 46, p. 318 (Madison).

To produce a workable government given the fierce contention of "opposite and rival interests," the Framers understood the necessity for "compromise of as many dissimilar interests and inclinations." The Federalist No. 85, p. 591. "The result of the deliberations of all collective bodies," Hamilton observed, "must necessarily be a compound as well of the errors and prejudices, as of the good sense and wisdom of the individuals of whom they are composed." [10]

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[9] D. Webster, *Second Reply to Hayne* (Jan. 26 & 27, 1830), *as reprinted in* 3 R. Byrd, *The Senate 1789-1989* 37, 48 (1994).

[10] *Id.* In that same spirit, Franklin, at a moment when the Convention was seriously divided and its future uncertain, spoke memorably of the need to compromise:

> When a broad table is to be made, and the edges (of planks do not fit) the artist takes a little from both, and makes a good joint. In like manner here both sides must part with some of their demands, in order that they may join in some accommodating proposition.

1 Farrand 488.

This can be seen almost every day that the Congress is in session. Opposite and rival interests accommodate one another. Coalitions form, and slowly a majority is attained. Whether the task is balancing development in different regions in the 1820's,[11] or reducing the deficit in the 1990's,[12] to legislate for a diverse, federal nation "Compromise and trade-offs are the key." *Id.*

The ability to compromise may turn on a single vote in either House. The Framers knew, for example, that the Senate might be "equally divided," and provided for the Vice President's deciding vote as President of the Senate. U.S. Const., Art. I, § 3, cl. 4. A bare majority of Senators (or fifty plus the Vice President) might join to pass a complex bill in which there is a provision critical to each. Absent that provision a Senator might have voted "nay," and the bill would have failed. Under the Line Item Veto Act, the President can strike that very provision and create a truncated version of a law which would not have passed the Congress.

The Constitution provides ground rules for revisiting compromises. The Presentment Clause enables the President to call for "reconsideration" by the Senate and House. Either body can decide that the changes which the President requests are unacceptable, and that no law should be enacted. But if they wish to override, they need to agree. If they wish to

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[11] D. Webster, *Second Reply to Hayne*, *supra* note 9, at 48.

[12] 141 Cong. Rec. S4444 (daily ed. Mar. 23, 1995) (Sen. Moynihan):

> In 1993, I was chairman of the Senate Finance Committee. The task of raising taxes by a quarter of a trillion dollars, and the lion's share of an equal amount in spending cuts, thus fell to our committee[ ] and to its chairman.
>
> How did we do it? We did it the way the Framers of the American Constitution envisioned. We made accommodations that made up for the defect of better motives.

modify a bill to accommodate the President's objections, the two Houses have to agree on a new text and present it to the President before it may become law. Or, if they wish to reconsider an existing law — by amending or repealing it, the House or Senate has to persuade the other to join in enacting a new one. Neither acting alone can change the terms of a bargain between them.

Under the Line Item Veto Act, the compromises within and between each House that make concurrence to legislation possible are subject to unilateral change by the President. The result will be an erosion of "that spirit of trust, which performance reinforces and creates the stability of our institutions." 142 Cong. Rec. S2974 (daily ed. Mar. 27, 1996) (Sen. Moynihan).

B. The Relationship Between the Political Branches

In addition to diminishing the ability of the legislative branch to reach the accommodations and compromises essential to its responsibilities under the Constitution, the Act threatens to disrupt significantly other balances struck by the Framers. This can be seen in relation to the veto itself, as well as other critical interactions between the political branches.

As designed by the Framers, the veto is a potent power. Its strength is demonstrated by experience. From President Washington's first veto to President Clinton's veto last November of the disapproval of military construction cancellations, Presidents have returned 1,468 bills to Congress. Only 106, or 7%, of these return vetoes have been overridden.[13] Moreover, the Framers contemplated that Congress would "often be restrained by the bare apprehension

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[13] *See Presidential Vetoes, 1789-1996*, S. Pub. 105-22, at ix (1997) (1,465 plus three vetoes last year).

of opposition" by the President. "A power of this nature, in the executive," Hamilton explained, "will often have a silent and unperceived though forcible operation." The Federalist No. 73, p. 498.

But the Constitution's design, the requirement that the veto power applies to entire bills, also tempers that power. Informed by having presided at the Constitutional Convention, Washington understood the President's unavoidable constitutional choice: to accept the bad (in the President's eyes) with the good, or reject the good with the bad. In a 1793 letter to Edmund Pendleton, he wrote:

> You do me no more than Justice when you suppose that from motives of respect to the Legislature (and I might add from my interpretation of the Constitution) I give my Signature to many Bills with which my Judgment is at variance. . . . From the nature of the Constitution, I must approve all the parts of a Bill, or reject it in toto. To do the latter can only be Justified upon the clear and obvious ground of propriety; . . .

33 *The Writings of George Washington* 94, 96 (1940).

The Line Item Veto Act frees Presidents from the hard choice that the Constitution requires them to make. Presidents no longer need weigh the good and the bad. Instead a President can take what he wants and, supplanting Congress, become "a super legislator" who unilaterally "'fix[es]' legislation with which he does not fully agree by canceling only portions of the bill." 142 Cong. Rec. S2944 (daily ed. Mar. 27, 1996) (Sen. Byrd).

There is danger to the presidency in this. The Constitution offers only two choices to a President when presented with bills to which "[his] Judgment is at variance." The President may look at it from Washington's vantage

point, assess whether overall a veto is "Justified upon the clear and obvious ground of propriety," and if a veto does not meet that test then allow the bill to become law (either with or without his signature) "from motives of respect to the Legislature."

Or, if the bill fails that restrained test, the President can take a second constitutional course that rejects the bill but demonstrates a willingness to work with his coordinate branch. This is the path of returning the bill with his objections. That course permits the President, together with Congress, "through consensus and compromise and negotiations between the two branches, [to] develop a new and better total product which he could then sign." 142 Cong. Rec. S2944 (daily ed. Mar. 27, 1996) (Sen. Byrd).

These constitutional courses keep in good repair the fabric that allows separate political branches to work in mutual respect to "integrate the dispersed powers into a workable government." *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635 (1952) (Jackson, J., concurring). The different course taken by the Line Item Veto Act — the unilateral imposition of statutory changes by the President right after his own act of approval makes it his duty to "faithfully" execute the bill that he had just signed — will inevitably damage that fabric.

Further, the Act's harm to the separation of powers goes beyond particular measures that a President might alter. The Act hands the President a powerful tool, beyond any power contemplated by the Framers, to use potential item vetoes to exact support from Members for other legislative measures or for the confirmation of nominees, or to cause them to refrain from oversight or candid criticism of the Executive through investigation or speech.

This is not late 20th century speculation. It is exactly what the worldly-wise delegates to the Constitutional Convention sought to avoid. Franklin, as noted earlier, described to the Convention how the Governor of Pennsylvania had used an absolute veto to cause the Legislature to strike "private bargain[s]" with him. 1 Farrand 99. Concerned that Presidents would use their absolute veto over bills to wrest favorable action from Congress on appointments, Mason seconded those observations: "The probable abuses of a negative had been well explained by Dr F as proved by experience, the best of all tests." [14]

C. The Relationship Between the Political Branches and the People

This Court has repeatedly held that the separation of powers is not merely an intramural interest of the branches of government. Abridgement of the separation of powers threatens harm to all whose "liberty and security" are its "ultimate purpose." *Metropolitan Washington Airports Authority v. Citizens for the Abatement of Aircraft Noise, Inc.*, 501 U.S. 252, 272 (1991); *see also United States v. Munoz-Flores*, 495 U.S. 385, 395 (1990) (allocation of lawmaking authority under Art. I, § 7, cl.1 of the Constitution "safeguard[s] liberty").

The public has a further stake in faithful adherence to the separation of powers in lawmaking: "effective and accountable" government. *Loving v. United States*, 517 U.S. 748, 757 (1996). Effectiveness is promoted because Article I's requirements of representation and bicameralism make

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[14] *Id.* at 101. Former President Taft objected to granting Presidents an item veto, finding "in such a powerful instrument like this, a temptation to its sinister use by a President eager for continued political success." W.H. Taft, *Our Chief Magistrate and His Powers* 27 (1916) (reprinted 1925).

Congress "the branch most capable of responsive and deliberative lawmaking." Public accountability is aided because the "clear assignment of power to a branch, furthermore, allows the citizen to know who may be called to answer for making, or not making, those delicate and necessary decisions essential to governance." *Id.* at 757-58.

The Act fails on these counts. Liberty and security are threatened whenever any public authority (here, a President through the item veto) can single out a few interests for adverse treatment. Accountability is diminished when, as occurs under the Act, responsibility for the final content of legislation is blurred.[15]

III. THE ACT UNCONSTITUTIONALLY GRANTS LEGISLATIVE POWER TO THE PRESIDENT

Defenders of the Act argue that it presents no issue about enlargement of the President's limited legislative role under Article I. This is so, they say, because his signature on a spending or tax bill carries him to the safe harbor of execution of the laws under Article II. The fundamental question, however, is not the "form" of the President's authority under the Act, but whether it is "essentially legislative in purpose and effect." *INS v. Chadha*, 462 U.S. at 952. Examined in that light, the Act places the President foursquare — procedurally, substantively, and unconstitutionally — in the legislative process.

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[15] *See* Brief Amicus Curiae for Congressman Dan Burton, at 15-16 ("there is no evidence that either of the provisions at issue in this case would have been approved by Congress in the absence of the Line Item Veto Act").

A. The President's Authority is Uniquely Tied to the Manner in Which He Exercises His Limited Power Under the Presentment Clause

The President's item veto power is dependent on his selecting one, and only one, of the choices that the Presentment Clause makes available to him in his limited legislative role under Article I. *See Bogan v. Scott-Harris*, No. 96-1569, slip op. at 10 (U.S. Mar. 3, 1998) (signing bill is "integral step[ ] in the legislative process"). The President gains item veto authority if he "signs" a bill. Item veto authority is not available if the bill becomes a law in any other way. Never before has Congress made presidential authority depend on the manner in which a bill becomes a law.[16]

If the intention of Congress was simply to give the President discretion in executing a spending or tax law, it would make no difference how that measure became law. But the Act is designed to "discourage [the President] from using his existing constitutional veto powers to veto an entire bill," 142 Cong. Rec. S2944 (daily ed. Mar. 27, 1996) (Sen. Byrd), by rewarding him with new item veto authority only if he signs a bill. By foregoing a constitutional veto, the President gets to use a newly minted statutory one. The Act is uniquely and inextricably embedded in the procedures of Article I.

B. The Power Ceded to the President — To Reject Provisions of Bills Solely Because of Disagreement with Them — is Legislative in Nature

After being launched by the way he uses his Article I presentment power, the "nature of the decision" implemented by the President "further manifests its legislative character." *INS v. Chadha*, 462 U.S. at 954.

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[16] *See* Rappaport, *Veto Burdens and the Line Item Veto Act*, 91 Nw. U. L. Rev. 771 (1997) (unconstitutionality of "signing" requirement).

The President is given a "maximum" (Conf. Rep. at 22) of five days to exercise his authority under the Act. This brief time allows Administration officials to search congressional committee reports to find appropriations items to line out,[17] and assemble "supporting material" (Conf. Rep. at 22) for a message to Congress. There is no intention that the President gain any executive experience in administering a spending or tax law before disassembling it. Indeed, the Act effectively precludes the President from gaining any such experience.

This is not a circumstance where the President "has the better opportunity of knowing the conditions which prevail in foreign countries," or to employ "confidential sources of information." *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 320 (1936). Nor is it a circumstance — because the Constitution "does not demand the impossible or the impracticable" — where Congress need not "find for itself every fact upon which it desires to base legislative action." *Yakus v. United States*, 321 U.S. 414, 424 (1944). Each of the detailed provisions lined out in this appeal is one for which Congress had found all the facts it needed for legislative action.

Instead, the free ranging grant to the President of authority to cancel items before learning anything from even trying to "take Care that [they] be faithfully executed" lays bare the Act's purpose. The Act effectively empowers the

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[17] Most of the appropriation item vetoes for this fiscal year were of amounts "represented separately" in conference reports, 2 U.S.C. § 691e(7)(ii), rather than specific amounts enacted in statutory text. To cancel them, Administration officials had to reach into explanatory text that was neither voted on by Congress nor presented to the President. *See Thompson v. Thompson*, 484 U.S. 174, 191-92 (1988) (Scalia, J., concurring) ("Committee reports . . . are frail substitutes for bicameral vote upon the text of a law and its presentment to the President.")

President to choose items to veto, from among the thousands of items cancelable annually in spending and tax bills, solely because of his disagreement with Congress about them.

The power to veto "improper" or "bad laws" that had been passed "through haste, inadvertence, or design," The Federalist No. 73, p. 495 (Hamilton), is, of course, one reason why the Framers provided the President in Article I with a conditional power to veto whole bills. The Line Item Veto Act, faithful at least to its name, enlarges the President's limited lawmaking role under Article I by also vesting him with the power to strike individual provisions he deems "improper" for any reason.

The power granted by the Act to "negate" the policy choices of Congress based simply on "disagreement" with them cannot be sustained under the non-delegation doctrine.[18] "That Congress cannot delegate legislative power to the President," this Court has long held, "is a principle universally recognized as vital to the integrity and maintenance of the system of government ordained by the Constitution." *Field v. Clark*, 143 U.S. 649, 692 (1892).

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[18] Lessig, *Lessons from a Line Item Veto Law*, 47 Case W. Res. L. Rev. 1659, 1663 (1997):

> [A]mong the legitimate intervening events that might justify a President's altering Congress's policy choice, disagreement is not one. The statute enhances the efficiency of the President's contrary policy will. This the constitution cannot allow. This is a statute designed simply to increase presidential control over the legislative process. Like the attempt to increase congressional control over the legislative process [*See INS v. Chadha*, 462 U.S. 919 (1983)], it should be unconstitutional.

Id. *Chadha*, as this Court noted, involved the question whether "disagreement" by the Congress with the Attorney General involved "determinations of policy" that can be implemented "in only one way: bicameral passage followed by presentment to the President." 462 U.S. at 954-55.

The delegation in the tariff act at issue in *Field* was permissible, in part, because "Nothing involving the *expediency* or the *just operation* of such legislation was left to the determination of the President." [19] But that is exactly the fundamental line that the Act crosses by empowering the President to strike out provisions that he deems inexpedient.

A sampling of the President's reasons for striking provisions of spending or tax bills illustrates the legislative nature of the power ceded by the Act. For example, he canceled items because they were "not requested in the President's FY 1998 Budget." *E.g.*, 62 Fed. Reg. 52452-69 (Oct. 7, 1997); *id.*, 54338 (Oct. 17, 1997). Article II, section 3 provides that the President shall "recommend" measures to the Congress, a power that enables him "to point out the evil, and to suggest the remedy." 3 J. Story, *Commentaries on the Constitution* § 1555, p. 413 (1833). Or under Article I, section 7 the President may "return" a bill with the "objection" that it contains matters he had not requested. But it is unimaginable that under Article II a President could say (or be authorized by Congress to say), "I will only execute laws which I request." [20]

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[19] *Id.* at 693 (emphasis added); see *J.W. Hampton, Jr. & Co. v. United States*, 276 U.S. 394, 410 (1928) (describing Court's holding in *Field*). The Framers used the term "expedient" to describe the President's duty to *recommend* to Congress any legislation that for any reason he deems wise to enact. U.S. Const., Art. II, § 3.

[20] Justice Story explained that in "ancient free states, the share of the people in the business of legislation was to approve or reject the propositions, which were made to them." The "necessary tendency" of that power "is, ultimately to concentrate all power in the *initiative* body, and to leave to the approving body but the shadow of authority." It would be "the surest means" of "overthrowing the public liberties, by corrupting the very fountains of legislation." 2 *id.* § 890, pp. 355-56.

The President has canceled an item because "it was not the subject of extensive deliberation and debate prior to enactment." 62 Fed. Reg. 54338 (Oct. 17, 1997). Of course, the President may "return" a bill with an "objection" to congressional "haste," The Federalist No. 73, p. 495, in enacting it. But it is unthinkable that under Article II a President could say (or be authorized by Congress to say), "I will not execute this law because Congress passed it with insufficient debate."

And the President has canceled items, including those in this appeal, because he disagreed with their policy, drafting, or implications for future legislative action. He struck the Medicaid item in *Clinton v. City of New York* because it gave "preferential treatment to only one State," and would be "a costly precedent for other States to request comparable treatment." 62 Fed. Reg. 43263. He lined out the tax item in *Rubin v. Snake River Potato Growers* because it "would not have benefitted farmers generally," among other reasons. *Id.*, 43267. These are the very kind of policy objections for which the President's veto power under Article I, section 7 is used. But the Constitution certainly does not permit a President to say under Article II (or be authorized by Congress to say), "I will not execute this law because I disagree with it."

C. The Legislative Character of the Line Item Veto is Further Revealed by What It Supplants: Measures Passed by Congress that Only Congress May Amend or Repeal

Finally, the "legislative character" of the President's line item authority is "confirmed by the character of the congressional action it supplants." *INS v. Chadha*, 462 U.S. at 952. The "congressional action" here is bicameral agreement that had become law, albeit briefly, with the President's signature. It is "supplanted" because, once the

President strikes an item, the measure that it was part of is effectively amended and the provision that is stricken is effectively repealed. Stricken direct spending or tax provisions no longer have "legal force or effect." Appropriations are "rescinded." As the district court held, the Act "authorizes the President to permanently extinguish laws." J.S. App. 30a. But as this Court has made plain, "Amendment and repeal of statutes, no less than enactment, must conform with Art. I." *INS v. Chadha*, 462 U.S. at 954.

Just as the President cannot take back a bill he has returned with objections under Article I, section 7, he cannot take back a line item veto, even if he quickly learns he was flatly mistaken. To illustrate, within days of the President's item veto of budget authority in the Military Construction Appropriations Act, the Administration realized that a number of cancellations were "a result of inaccuracies in the data provided by the Department of Defense." *See* 143 Cong. Rec. S11183 (daily ed. Oct. 24, 1997) (letter from OMB Director). But nothing could be done except to pass a new law because the item veto eliminated budget authority for those projects.

IV. THE CONSTITUTION'S "SINGLE, FINELY WROUGHT" LAWMAKING PROCESS IS INDIVISIBLE

Appellants did not present to this Court a question about severability. Nevertheless, they assert that "[e]ven if the Act's provisions regarding limited tax benefits were found to be constitutionally deficient, that result would not affect the validity of the rest of the Act." Brief for Appellants, at 48 n. 28.

The Act does not contain a severability clause. A severability clause had been added to the Senate bill by floor amendment, 141 Cong. Rec. S4259 (daily ed. Mar. 21,

1995), but was dropped in conference, Conf. Rep. 17, 41, albeit without explanation.

There is substantial evidence that inclusion of measures to address a range of components of the deficit problem — appropriations, direct spending and targeted tax benefits — was essential to the bargain that made passage possible. Senator Stevens, the chairman of the Committee on Appropriations and a manager at the conference on the bill, explained how he moved from being an opponent to a supporter. He "opposed this bill in the past because it did not cover the largest culprits of wasteful spending: entitlements and tax breaks for special interests." "At my request," he told the Senate, "the bill has been expanded and broadened to cover not only appropriations for specific projects but tax breaks and entitlements as well." He now supported the bill because it included "the core concept" that he had "insisted" on. 142 Cong. Rec. S2955 (daily ed. Mar. 27, 1996).

There is no occasion, however, to reach a statutory severability question. The overriding point is that the "single, finely wrought" constitutional procedure for making laws, *INS v. Chadha*, 462 U.S. at 951, is indivisible. Other than requiring that revenue bills originate in the House, the Constitution's lawmaking system is the same for legislation on all subjects.

In *Chadha*, Justice Powell, concurring in the judgment, would have invalidated the legislative veto only as applied to the adjudication of an individual's rights without reaching "the broader question whether legislative vetoes are invalid under the Presentment Clauses." *Id.* at 967. But the Court understood that the question was whether the one-House veto was "legislative in purpose and effect and subject to the procedures set out in Art. I." *Id.* at 957 n.22. Once the Court identified the question as such, its reasoning had the

inevitable effect of sweeping away all legislative vetoes. *Id.* at 967 (White, J., dissenting).

The natural consequence of a comparable ruling invalidating the line item veto as a violation of the Constitution's "single" lawmaking system would be the same for all line item vetoes, just as the ruling in *Chadha* was for all legislative vetoes, no matter what their subject might be.

CONCLUSION

The Court should affirm the judgment of the district court.

Respectfully submitted,

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